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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO COVIAN,

Defendant and Appellant.

In re GUSTAVO COVIAN,

on Habeas Corpus.

H025891

(Santa Clara County
Super. Ct. No. 210681)

H027184

Defendant Gustavo Covian, convicted at jury trial of first degree murder with a financial gain special circumstance, claims his constitutional rights were violated by the trial court's admission into evidence of statements of coparticipants to the crime and its refusal to reopen the case during jury deliberations to allow the testimony of a belatedly available defense witness. In addition, the prosecutor's closing argument violated his due process rights. In a petition for a writ of habeas corpus, defendant claims his counsel was ineffective.

FACTS

Defendant's trial took 15 days during which 25 witnesses testified. Because the sufficiency of the evidence is not challenged, we shall not state the facts in detail. Young

Kim (Young),¹ who with his wife Kyung Kim (Kyung) operated the Gavilan restaurant in Gilroy, drove his car home and into his garage after he closed the restaurant around 9:30 or 10:00 p.m. on November 13, 1998. He was never seen again. Around the end of November, his friend Alfonso Bravo, who had met Young six years earlier by doing plumbing jobs for him, missed seeing him at the restaurant and asked Kyung where he was. She said that Young “took off for Mexico.” Bravo asked, “ ‘he told you he was going to Mexico?’ she said, ‘no, . . . he just took off.’ ” Young had not said he was going; Kyung “just believe[d] it.” Bravo did not think Young would “disappear like that” because when he went to Mexico on a vacation or trips he always told somebody in advance.

Gavilan waitress Sandra Herman knew a few days before Young’s disappearance that he planned to go to Mexico, but she did not know for how long. His trips were usually just for a few days. He had never “disappeared” before November 13. After he was gone four or five days, Kyung told Herman she hadn’t heard from him. Kyung seemed worried. Herman suggested calling Young’s family² but Kyung did not say anything more about Young’s disappearance until her neighbor, Young’s best friend Mauro Sanchez, approached her about contacting the police. Sanchez, Kyung, and her college student daughter Helen, went to the Gilroy police on November 29, 1998.

All three were visibly upset and Kyung was crying but gave the officer “very little information. She had told me [the officer] that he had been depressed, and . . . that he did have a gambling problem.” She said she had last seen Young at the restaurant around

¹ Convenience, not disrespect, is intended by use of the parties’ first names. (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 280.)

² Chung Weber, Young’s younger sister in San Diego, repeatedly called Kyung asking “if she has heard anything. And [Kyung] got really agitated and she told me not to call her any more about that, because she’s getting headache [*sic*] from that people keep asking her what happened with my brother.” Kyung told her to stop calling. Kyung shocked Chung because she did not seem worried and she was not looking for Young.

10:00 p.m. However, she seemed reluctant to give additional information such as “the missing person’s mental state, if there had been any marital problems, anything that may help our investigators” According to the officer, “that is different than [*sic*] the numerous other missing person reports that I take.”

Young had been depressed about his marriage, his father, his business, and his finances, and although his sister Chung Weber thought he “wasn’t really talking seriously,” he had told her he wanted to kill himself. His elderly father was dying of cancer and it fell to Young to buy a casket for him. Young was upset because Kyung was going out exercising every night with a “guy”³ and she would not compromise about it or try to work out problems in the marriage. Young thought he had \$400,000 in the safe at the restaurant but learned from his sister Li that Kyung had been giving money to her brothers. Li told him and Chung that there was less than \$10,000 in the safe. Kyung handled the restaurant’s finances and worked out in front. She also handled the finances at home. She paid Helen’s college bills and gave Young spending money when he wanted it. He did not use credit cards. Young operated the kitchen and ordered the food.

The restaurant, a largely cash business, was doing poorly. Two motels were being built nearby and the parking lot was so muddy that people did not want to drive or walk in. Young socialized with the male staff but the female staff did not like him. Herman said Young was usually unpleasant and in a bad mood and yelled and screamed a lot. Young was “a drinker.” Two or three times Herman came into the restaurant in the morning and saw Young passed out in one of the booths “stinking like alcohol.” She also saw him drinking at work. He wrecked two cars in one month.

³ Herman testified Kyung and the man dated for a couple of years and that she had warned Kyung that he was a married man who frequented the restaurant and had dated a waitress before.

Young would come home drunk and he and Kyung would shout and yell at each other. Young pushed and hit Kyung on more than one occasion, leaving her with bruises and a black eye. Young was physically abusive to Helen and his 12- to 13-year-old son Daniel and they were scared of him although both felt close to him. Young gave Helen a black eye one time. Another time he kicked Daniel so hard in the leg that the boy reported it at school. Herman said Young had to go to anger management classes because of that. Notwithstanding, Young's sister Chung Weber described him as a fun-loving friend and a loving, caring, father and son.

Kyung confided in Herman about her problems with Young. More than once, she told Herman that she hated her husband and wished he was dead. Herman suggested a divorce (the marriage had been arranged) but Kyung said it was unacceptable because it would shame her family in Korea. Kyung knew that Young had a girlfriend.

On the positive side, Young was making plans to remodel the restaurant and expected business to improve when the motel construction was finished. Young spent time with Daniel and took him to see his grandfather and grandmother almost every weekend.

Young's friend Bravo thought he was a "very friendly person," but a lonely one, which Bravo attributed to Young's face being marked by the chicken pox he contracted when he was a child. Young "used to . . . hang around with Mexican guys all the time," and Bravo thought Young felt more comfortable around Mexican people. Young's nickname was "Chumuboco," Mexican slang for "devil." Young's "drinking buddies" were Bravo, Sanchez, and Jose "Chuy" Estrada, a cook at the restaurant. Sanchez and Young went to local bars together to play pool and saw each other almost every day. Bravo would accompany Young to Korean and Mexican bars where he sometimes met other women, including his girlfriend. Bravo also went with him to his parents' house on the coast on two occasions and met Young's girlfriend.

Shortly after the second car crash, Kyung was angry with Young and was in the restaurant kitchen with Herman and Maria Covian (Maria), defendant's wife and a waitress at the restaurant. They were discussing whether Young was doing drugs. Kyung said she wished her husband had died in the car accident. Maria answered, "There are people that could take care of that for you." Or, people "will do stuff like that," meaning, Herman testified, "get rid of" Young. This shocked Herman who walked away. After that, she kept away from the other two women when they spoke privately together.

On Friday, November 13, 1998, Estrada and Young closed the restaurant about 9:30 or 10:00 that night after which they were going to have a beer with Sanchez. Estrada followed Young home and waited in his car while Young drove into his garage. The garage and outside lights lit up as Young drove inside, while the rest of the house stayed dark. Estrada waited about 20 or 30 minutes for Young who did not reappear. Estrada then left. He did not see or hear anything unusual.

Daniel was downstairs watching TV in the living room. He thought his mother was upstairs getting ready for bed. Around 10:00 p.m., he heard the garage door open and, fearing his father would be angry because he had stayed up late, he ran upstairs to his sister Helen's unoccupied bedroom. However, he did not hear the garage door close or the door into the house open, or his father come inside. Daniel thought this was odd. Upstairs, his mother came into Helen's bedroom and told Daniel to go to sleep. She paced back and forth for a while and "crack[ed] open the blind and look[ed] outside" through the window that faced the street. Daniel heard nothing unusual that night. When he awoke, his father's car was in the garage but Young was not in the house. Later, when the family moved out of the house, Daniel saw defendant helping Kyung move.

A couple of weeks after Young's disappearance, Estrada went to Sanchez's house to ask about Young. Sanchez telephoned Kyung who said that Young had gone to

Mexico. Sanchez knew that Young never just disappeared, so he went to the restaurant and then accompanied Kyung to report her husband missing.

Police found Young's car in the garage and its keys inside the house. None of his bags or any of his clothes were missing. His gas credit card showed no activity. Paperwork on getting a divorce was in the car's glove compartment. Young's photograph was sent to the media and to a national databank. No unidentified bodies matched his description. Mexican authorities were contacted. After Chung reported that Young had thought about suicide, the hills near his house were searched with horses and airplanes. After anonymous telephone calls in July 1999 led police to search for a body with mounted patrol and cadaver-sniffing dogs along the Las Viboras Road in Hollister, a flyover also was conducted. All results were negative.

With Young gone, defendant would come to the restaurant looking for Kyung and would leave if she was not there. He would also eat food without paying for it. Estrada overheard defendant claim that he was the owner and a boss. He said, "Your boss isn't here anymore; you can do whatever you want; I can come in here and I don't have to pay." One time, defendant came into the restaurant with some children and displayed a gun that was inside his waistband to Estrada. Estrada felt defendant was trying to scare him and the other workers. Another time Herman saw defendant enter the restaurant through the back door and talk to Kyung in her office. Kyung screamed for Herman who ran to the back. Defendant was leaving through the back door. Kyung yelled to call the police. She also told Herman that if defendant called to say that she was not there.

There was a change in Maria's behavior, also. Herman saw her steal anywhere from \$40 to \$100 from the cash register. When Herman told Kyung about the theft, she said she would take care of it, but Maria continued to work there until she was arrested. On November 22, 1998, Maria deposited \$6,600 in her and defendant's bank account. Around this time, defendant purchased a new Dodge pickup truck for himself. Six months later, Maria bought a used Toyota Camry for herself.

After Young disappeared, business got worse. A lot of the old customers, especially highway patrol officers and deputy sheriffs, were not coming in anymore. Costs kept going up. Checks Kyung sent to Helen for rent and tuition began “bounc[ing].” The gas and electricity was shut off once and Kyung had problems paying bills and meeting payroll. As of October 1999, the Internal Revenue Service put tax liens on the restaurant. Kyung’s friends, Hyoung Il Kim and his wife, loaned her \$10,000 in July and \$10,000 in November 1998. Lee Yong Duk and his wife lent Kyung another \$30,000 on March 1, 1999. Kyung finally declared bankruptcy and sold her house in foreclosure in 1999. Helen took over management of the restaurant when Kyung was arrested in June 2001 and sold it in 2002.

Sometime in 1999, less than a year after Young vanished, Sanchez encountered Bravo in a bar. Sanchez testified Bravo told him the Covian and Sanchez families were from the same hometown in Mexico. At a Covian family barbecue in Hollister, Bravo heard defendant brag that he had killed Young. Sanchez was “totally blown away” by this revelation and asked Bravo what he did. Bravo answered, “hey, he’s my friend.” Sanchez stated Bravo warned him that defendant and his family were very dangerous.⁴ Sanchez did not report the conversation to the police because he feared getting involved.

Around March 2000, Kyung, crying hysterically, told Herman that she had just spoken to defendant and that he had demanded more money from her and threatened to kill her daughter at college in San Diego if he did not get it. On another occasion, Kyung called Herman from the police station and asked her to come in. The police were taping Kyung’s statement and she was reluctant to talk to them. Herman advised her to tell

⁴ At trial, Bravo denied the conversation although he admitted knowing the family since they were children in Mexico. Bravo stated he wanted no problems with the Covians; he was concerned that his own family would be harmed if he testified against defendant. He stated he had heard that defendant told Estrada, “If you say anything, Chuy, I’ll kill you.”

them everything that she had told Herman, which Kyung did. About a month after that, defendant took one of his daughters to Herman's house, held up a small cassette tape, and said, "Tell Mrs. Kim I have this." Herman stated, "I told him that I had never had any problems with him or his family, nor did I want to be involved in this in any way. He was very nice to me and accepted that, and he took his little girl and they left."

At the trial, Adrian Vizcaino, defendant's brother-in-law and partner with defendant's brother Ignacio in a San Benito County armed robbery, burglary, false imprisonment, and endangering a child which defendant had suggested and helped plan, testified under a promise of leniency. Vizcaino was promised that if he testified truthfully, the San Benito County court would consider probation and an 11-year suspended prison sentence instead of the 21 years in prison he was facing.

Vizcaino stated that before he married defendant's sister Griselda in October 1998, he rented a room in defendant's and Maria's house in Hollister. Defendant was not working and seemed poor, as he asked for a loan to pay bills. Defendant and Vizcaino used cocaine together, and socialized together.

According to Vizcaino, defendant's many brothers and sisters discussed Young's disappearance. Maria was said to have paid someone to kill Young for Kyung because he would come home drunk and beat her up a lot. Maria had also complained that defendant took his young daughters to the restaurant to collect money while he was drunk and armed with a weapon.

Vizcaino testified that when he asked defendant if he killed Young for money, defendant denied it at first but later admitted shooting Young in the head at Young's home with a .357-caliber gun. Vizcaino stated the gun resembled one police seized from defendant's house when they served a search warrant. Vizcaino had refused to borrow it for the San Benito County crimes because defendant told him he used it to shoot Young. Defendant said when the bullet hit Young's head, there was blood on the wall and floor. Defendant did not name the others who were there but Vizcaino eventually learned they

were defendant's brothers Humberto and Ignacio. According to defendant, they cleaned up the blood and buried the body. Defendant said he "knew how to get the job done," because he was a "professional." Defendant said the price for the killing was \$100,000, of which \$35,000 was still owed. Defendant warned that if he was not paid the remainder, he was going to kill Kyung, too.

In June or July of 1999, Ignacio showed Vizcaino where the body was. In October, Humberto showed Vizcaino the same spot. Humberto later said the body had been moved and hidden somewhere else. Humberto and Griselda each told Vizcaino that Maria went to the burial site to perform a form of witchcraft, releasing some snakes there "so that nothing would ever be known." Humberto was blackmailing Kyung and she had given him two \$1,500 payments. He wanted Vizcaino to go with him when he received the money because he "was fearful that they would do something to him; and he was also afraid of his brother Gustavo."

Around March 1999, Danny Ray Callahan, father of Tammy, the mother of Ignacio's two children, and ex-brother-in-law of Sandra Herman with whom Tammy had worked at the Gavilan restaurant, received a telephone call from Ignacio. Ignacio wanted help robbing a dairy farm in Hollister near the old Covian house by Las Viboras Creek. Callahan, who had served prison terms both in California and Washington state, agreed. Once back in California from Washington, Callahan met with Ignacio, defendant, and Vizcaino to plan the robbery. As they discussed the robbery, Ignacio asked Callahan if he would also be willing to move a body from Hollister to somewhere near the California-Oregon border. Ignacio said the body was wrapped in plastic and buried near the creek where his parents used to live. The four men got shovels and walked toward the creek bed. They were scared away, however, by the presence of a woman and her children on the porch of a house across the creek. The idea of digging up the body was later abandoned.

The dairy appeared too difficult to rob, so Ignacio, and Vizcaino broke into a house but left without robbing anyone. Callahan drove the getaway car. Callahan was arrested for a parole violation on his way back to Vancouver, Washington. Callahan later took Detective James Callahan (no relation) to within two or three hundred yards of the spot by the creek Vizcaino had also showed the detective.

At the end of October 1999, Vizcaino fled to Wisconsin where he was arrested. He thought he had an agreement that defendant would give him money for a lawyer, but defendant failed to help. Vizcaino showed the Gilroy police the location where the body might be buried. No traces of blood or bullet holes were ever found in Young's house, car, or restaurant.

Defendant and Maria were arrested early in the morning of April 28, 2000, when police executed a search warrant. Defendant, Maria, Ignacio, and Kyung were indicted for the murder of Young Kim for financial gain. Defendant's case was severed from the others and a jury found him guilty and the special circumstance true. He was sentenced to life imprisonment without the possibility of parole. This appeal ensued.

CONTENTIONS ON APPEAL

Defendant claims the trial court violated his constitutional rights by admitting into evidence: (1) his conversation with his wife in the backseat of the patrol car when he was arrested; (2) Kyung's statement that she was afraid of defendant and that he was extorting money from her; and (3) his admission of guilt to Bravo at a barbecue and Bravo's testimony that "Chuy" said defendant had threatened to kill him. (4) The court abused its discretion by refusing to reopen the case when an "important defense witness became available"; (5) the prosecutor's "improper closing argument" violated his due process and fair trial rights; and (6) this court must strike the Penal Code section 1202.45 parole revocation fine of \$10,000 as unauthorized. The People agree with this contention; accordingly, the fine will be ordered stricken.

MARITAL PRIVILEGE

Defendant contends that when he and his wife talked in the backseat of a police car shortly after their arrest, police improperly “seized” the communication by video taping it. The statement contained prayers⁵ and statements between defendant and his wife implicating defendant and his wife in the crime.⁶ Defendant argued for suppression

⁵ The transcript of the tape has six single spaced pages of repetitions of all or part of the Lord’s Prayer interspersed with petitions for help customized to the occasion. For example: “Our Father who art in heaven hallowed be thy name, thy Kingdom come, thy will be done on earth as it is in heaven (unintelligible). Help me, Saint Peter. (Unintelligible) don’t abandon us. Don’t abandon us Have mercy on my daughters. Have mercy on me. . . .” Other petitions inserted into the text of the prayer were: “[S]how me your power. You can make all of these [*sic*] disappear. Make all of these [*sic*] disappear, that I don’t die (unintelligible) that I don’t die. Make them disappear. Holy, holy, holy, make them disappear. Holy, holy, holy.” “Don’t let them find it. Don’t let them find it. Don’t let them find it. . . .” “That they don’t find any gun there upstairs, Lord, that they don’t look for it. That they don’t find it . . . [followed by eight repetitions of ‘that they don’t find it’ followed by nine repetitions of ‘Holy, holy, holy’].” Then, six complete or partial repetitions of the Lord’s Prayer were followed by “Don’t allow it, my God, don’t allow it, I implore you (unintelligible). Don’t allow it, I implore you and I beg you. . . . Holy, holy, holy. . . . I implore you, my God, I beg you, to set me free of all this, me and my wife, and we will leave this (unintelligible) of pure envies (unintelligible)” “Our Father who art in heaven hallowed be thy name, thy Kingdom come, Jesus Christ, please, don’t refuse me, holy spirit. You know everything (unintelligible) holy spirit. Don’t allow that we go to jail, me and my wife. You can make, with your power, I think, that everything be a mistake, that everything be a mistake. And I give up everything that-I give up my house. I give up my truck. I give up everything so that I can have my daughters and my wife by my side and to leave here (unintelligible) to I don’t know what place. Here there are only jealous people, jealous (unintelligible), I implore you. I beg you. [17 repetitions of ‘Holy, holy, holy’]”

⁶ Maria stated that during a search of their house, police found \$400 that defendant had had; defendant stated “[t]hey don’t have any facts. [¶] [MARIA]: Why did they catch us then? [¶] [DEFENDANT]: Because they pointed fingers at us. [¶] . . . [¶] [DEFENDANT]: (Unintelligible) keep them away; remove them. . . . remove them. . . . remove them. . . .” An officer’s voice interrupted to ask defendant where the keys to his truck were, after which defendant prayed, “(Inaudible) Saint (Alejo) [*sic*], remove them. Saint (Alejo), remove them. Saint (Alejo), remove them. Saint (Alejo), remove them.” (continued)

of the statement at trial because the couple shared a reasonable expectation of privacy in the conversation, it was a privileged spousal communication (Evid. Code, § 980), and its admission into evidence at trial violated his right to due process and his Fourth Amendment right to be free from unreasonable searches and seizures.

Gilroy Police Officer John Marfia was assigned to transport defendant and Maria to jail after their arrest. He drove a marked patrol unit equipped with a standard video camera, two inches high, two inches wide, and six inches long, that was mounted on the ceiling next to the rear-view mirror. He was instructed to turn the camera around toward the backseat ahead of time and get it turned on before defendant and Maria were placed in the car. Marfia prepared to record the Covians before he left Gilroy. He sat in the backseat and while looking straight ahead out of the front windshield, was able to see that the red light on the control panel was on. The purpose was to record anything said in the backseat. Marfia did not promise defendant or Maria that they could speak privately inside the car. Defendant was placed in the car first. No one told defendant there was a camera or tape recording device. Maria was put in about 10 minutes later. She also was

Another tape was made after defendant and Maria were booked while they were waiting to be driven to the county jail in San Jose. They discussed getting an attorney and his advice not to say anything. Defendant said “they don’t have proof,” and added, “there . . . is not enough evidence simply someone is jealousy [*sic*] of us because we didn’t get a brother-in-law out of jail and they said they were going to blackmail us knew, about the death . . . the man from the restaurant . . .” Defendant suspected “someone in the family,” and mentioned the names Marina and Javier. Maria replied that Octavio told her something and chided defendant for having told him everything. Maria brought up the pistol and defendant stated “[t]hey haven’t found it yet.” Maria responds, “Yes they found it.” Defendant told Maria that he “ask[ed] God that I will pay in hell, in purgatory, but not to make me pay here among the men and under the law here.” An investigator asked defendant about his being on probation in San Benito County and the name of his probation officer. Defendant mentioned getting out of jail and going to Mexico. He again prayed that “ ‘they don’t encounter it’-or find it . . .” and stated that the gun was wrapped in a sock in with his pants. Maria responds, “they got everything out, all our clothing.”

not warned about the camera. She and defendant were placed in the same patrol unit pursuant to “the plan” to see if they would talk with each other. Marfia moved away from the patrol unit between 10 and 20 feet and walked around. Other officers did the same. Marfia did not try to listen to what was being said in the patrol car. He left the patrol car in the driveway about half an hour before transporting defendant and Maria to the Gilroy police department. On arrival, Marfia turned them over to the booking officers. He took the tape out and, according to “the plan,” inserted a new tape. Then defendant and Maria were placed back in the car for an hour or two so they could talk some more until they were driven to the county jail in San Jose.

Defendant testified at the motion in limine to suppress the statements. He stated the police car had a metal mesh screen between the front and backseats and he did not notice if there was a video camera in the patrol car. Defendant stated, “I was not paying attention. I was just praying. I was scared, and I was praying.” He was not warned that anything said in the car was being recorded. Defendant considered his prayers to be between him and God and his conversation with his wife private.

The trial court denied the motion stating that there was no objective standard by which a person in custody in a police car would think that what he says is “private and that it’s not going to be eavesdropped upon, it’s not going to be recorded or videotaped by law enforcement, especially in a situation wherein the videotape camera is in plain view. I don’t find he was lulled into a false sense of security.” The court pointed out that the police did not assure defendant that what he said was going to be entirely private.

As for privilege, the court also found that the “prayers” were not a penitential communication so as to involve a “penitent-clergy-type privilege,” but were “hopes and desires on behalf of the defendant that the police d[id]n’t find certain evidence.” The court also found that although the statements between Maria and defendant were marital communications, they were not privileged because there was no reasonable expectation of privacy at the time the communications were made.

An appellate court's review of a ruling on a motion to suppress is governed by well-settled principles. The finder of fact, the superior court, has the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence, and draw factual inferences in deciding whether there has been a constitutional violation. (*People v. Woods* (1999) 21 Cal.4th 668, 673.) Any factual finding, express or implied, will be upheld if supported by substantial evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 327.) The appellate court independently assesses, as a matter of law, "whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*Ibid.*) For purposes of establishing the marital privilege, the existence of a reasonable expectation of privacy is a predominantly factual mixed question. Its resolution is subject to review for substantial evidence. (*People v. Mickey* (1991) 54 Cal.3d 612, 654.)

In determining whether any police conduct has infringed upon a reasonable expectation of privacy violating defendant's Fourth Amendment rights,⁷ we must determine whether defendant had both a subjective and an objectively reasonable "expectation of privacy"-an expectation "that society is prepared to recognize as 'reasonable.' " (*Katz v. United States* (1967) 389 U.S. 347, 361; *California v. Ciraolo* (1986) 476 U.S. 207, 211.) "[S]ubjective expectations of privacy that society is not prepared to recognize as legitimate have no protection." (*People v. Reyes* (1998) 19 Cal.4th 743, 751.)

⁷ Defendant claims the trial court violated his First Amendment right to privacy, his Fourth Amendment right to be free from unreasonable searches, and his Fourteenth Amendment rights to due process in admitting the evidence of his and his wife's statements. However, his discussion focuses on the Fourth Amendment violation. The People point out that "[t]he court's actions are not the focus under the Fourth Amendment. That amendment prohibits police officers and other governmental officials from engaging in unreasonable searches and seizures. (*New Jersey v. T.L.O.* (1985) 469 U.S. 325, 335.)"

There is generally no reasonable expectation of privacy for communications taking place in a custodial setting. (*Lanza v. New York* (1962) 370 U.S. 139, 143-144 (*Lanza*) [tape recording juvenile's jailhouse conversation with his mother no Fourth Amendment violation]; *People v. Crowson* (1983) 33 Cal.3d 623, 629 [taping defendant's police car conversation with his suspected accomplice no violation].) Defendant, however, claims that this rule does not apply to a privileged conversation. (*People v. Loyd* (2002) 27 Cal.4th 997 [law enforcement may monitor and record unprivileged communications between jail inmates and their visitors].) He cites *Lanza* for the statement "Though it may be assumed that even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any such special relationship here." (*Lanza, supra*, 370 U.S. at pp. 143-144, fn. omitted.)

"[A] spouse . . . , whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife." (Evid. Code, § 980.) When a privilege is claimed on the basis of the husband-wife relationship, it is presumed to have been made in confidence. The opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. (Evid. Code, § 917.) However, there is no privilege if the communication was made to enable anyone to commit or plan a crime or fraud. (Evid. Code, § 981.)

Defendant relies on *North v. Superior Court* (1972) 8 Cal.3d 301 (*North*) for the proposition that a statement between a defendant and his wife when they were alone in a detective's private office in a police station was subject to the marital privilege. In excluding evidence of the conversation, our Supreme Court stated that the couple's expectation of privacy arose because the detective who had arrested the defendant surrendered his private office to the defendant and the defendant's wife "so that they

might converse . . . exit[ed] and shut[] the door, leaving them entirely alone.” (*Id.* at p. 311.) The court stated that “jail security can be adequately maintained without resorting to the deliberate creation of a situation in which marital privacy could reasonably be expected to exist. We cannot sanction the device of secretly exploiting marital confidences, as was done under the circumstances of this case, for the sole purpose of gathering possibly incriminating evidence. Such a device constitutes, we believe, an ‘unreasonable governmental intrusion’ of the sort condemned in our prior cases.” (*Id.* at p. 312.)

Defendant argues that by being placed in the patrol car alone with his wife, with the officers surveilling them from out of earshot, even with a camera mounted by the rearview mirror in the patrol car, he was “lulled into believing their conversation would be confidential.” (*North, supra*, 8 Cal.3d at p. 311.) He notes that Marfia “took great care to make sure that [the camera] would not be noticed: twice the detective carefully changed the tape . . . when [defendant] and his wife were not in the patrol car.” (Emphasis original.)

We disagree. In *North*, an expectation of privacy was created by the detective’s “admitted conduct [allowing the arrested defendant’s wife to visit him, turning his private office over to them, and leaving and shutting the door behind himself] spoke as clearly as words” (*North, supra*, 8 Cal.3d at p. 311.) Nothing in the *North* detective’s actions indicated that North’s conversation would be monitored. (*Ibid.*) In the instant case, defendant and his wife had just been woken from a sound sleep, arrested, and told that the officers were executing a search warrant. Defendant and Maria sat in the living room for about 45 minutes while the officers were searching. Consequently, defendant knew the collection of evidence was one of the primary purposes the officers were there. Defendant and Maria were placed in the patrol car. No police officer made any representations by word or deed to either defendant or his wife that they could hold a private conversation in the police car. (See *People v. Hammons* (1991) 235 Cal.App.3d

1710, 1716.) Marfia, himself, did not say or do anything to make defendant believe that he was not being monitored. The fact that he and other police officers “stroll[ed] around” a few feet away from the patrol car was not the kind of action meant to convey an expectation of privacy. Nor was the monitoring surreptitious. The camera and the light indicating it was operating were in plain view even though defendant did not notice them. Consequently, although defendant did not actually realize that the conversation was being monitored (see *People v. Santos* (1972) 26 Cal.App.3d 397, 402) and might have thought he had privacy, the circumstances surrounding the monitoring cannot support the inference that the officers meant to convey to defendant that he could reasonably expect privacy. The trial court did not err in admitting the evidence.

DEFENDANT’S THREATS TO KYUNG

Next, defendant asserts that the trial court violated his constitutional right to confront witnesses against him by admitting into evidence statements made by codefendant Kyung which he claims were not admissible under either the coconspirator statement exception or the spontaneous statement exception to the hearsay rule. He states that Kyung’s statements to Herman in March or April 2000 that she was afraid of defendant and defendant was extorting money from her were neither made in furtherance of a conspiracy to kill Young nor were they spontaneous statements. “[E]ven assuming that a conspiracy existed, by the time of [Kyung’s] statements to Herman, the conspiracy had broken down: [Kyung] and [defendant] were at loggerheads and no longer acting in concert.”

The trial court ruled, pursuant to *People v. Leach* (1975) 15 Cal.3d 419 (*Leach*), that there had to be independent evidence of a murder-for-hire agreement; that “the conspiracy was continuing to accomplish the payment on the agreed-upon amount to commit the murder”; and that there were efforts being made to collect on the “contract.” The independent evidence consisted of defendant’s admission to Vizcaino that he killed Young for \$100,000; that he had not been paid in full; that \$35,000 was still owing; that

if he did not receive it, he was going to kill Kyung; and the evidence that Kyung borrowed \$50,000 through March 1999. In contrast to the usual case where the hitman flees the scene, the court found that defendant remained in the area as a “creditor,” with Maria still working at the restaurant. Accordingly, Kyung’s statement made some months before defendant’s arrest while there were ongoing efforts to “finalize [the] contract,” were admissible under the exception provided in *Leach* for situations where “‘efforts at a payoff are necessary to preserve the debtor’s personal safety.’” The “continuing conspiracy in the court’s view [was] that satisfaction has not been paid on the contract.” After Herman testified, the trial court also ruled that Kyung’s statements were separately admissible as spontaneous utterances. “If somebody receives a phone call, hangs up, comes out of the room, is crying and hysterical and explains what she just heard on the phone call, under the law that’s a spontaneous declaration, which is an exception to the hearsay rule.”

The trial court’s decision on the admissibility of evidence is reviewed for abuse of discretion. (*People v. Sanders* (1995) 11 Cal.4th 475, 516.) It “ ‘will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Hearsay statements by coconspirators may be admitted against a party if, at the threshold, the offering party presents independent evidence to make a prima facie showing of the existence of a conspiracy. (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215.) A conspiracy is shown by evidence of an agreement between two or more persons with the specific intent to commit such offense, which agreement is followed by an overt act committed by one or more of the parties for the purposes of furthering the object of the agreement. (*People v. Longines* (1995) 34 Cal.App.4th 621, 625-626.) Once independent proof of a conspiracy has been shown, three preliminary facts must be established: (1) that the declarant was participating in a conspiracy at the time of the

declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating in or would later participate in the conspiracy. (Evid. Code, § 1223; *People v. Jeffery, supra*, 37 Cal.App.4th at p. 215.) A conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated. (*Leach, supra*, 15 Cal.3d at p. 431.) It is for the trial court to determine precisely when the conspiracy has ended. (*Id.* at p. 432.) However, “ ‘[a] conspiracy is not necessarily a single event which unalterably takes place at a particular point in time when the participants reach a formal agreement; it may be flexible, occurring over a period of time and changing in response to changed circumstances.’ [Citation.]” (*People v. Vargas* (2001) 91 Cal.App.4th 506, 553.)

The trial court did not err in admitting the evidence. Defendant was charged with murder under special circumstances, that is, that he committed the crime intentionally and for financial gain. To prove the special circumstance, the prosecution had to show that the murder was intentional, that it was carried out for financial gain, and that defendant believed the death of the victim would result in the desired financial gain. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1229; CALJIC No. 8.81.1.) Financial gain was not just some secondary, postconspiracy objective beyond the substantive crime, it was a principal objective of the conspiracy. (*People v. Montiel* (1985) 39 Cal.3d 910, 927.)

The conspiracy began when Kyung told Maria and Herman that she wished Young was dead and Maria offered “people who could take care of that for you.” After the killing, defendant boasted about it to Vizcaino and Bravo and to family members. He told Vizcaino that he was a “professional,” and had done the killing for \$100,000 of which \$35,000 was still owed. Defendant stated if he did not receive the rest of the money, he would kill Kyung, too. Defendant kept going to the restaurant looking for Kyung and frightening her and threatening the safety of her daughter. He gloated that he was now the owner and boss. He ate food and did not pay for it. He threatened and

bullied the employees. Defendant, who several months earlier had needed to borrow money from Vizcaino to pay bills, bought a car in November 1998, and his wife, who stole money from the till, bought a car in May 1999. In March 1999, although Kyung had borrowed \$50,000, she was unable to make payroll and pay her daughter's tuition and rent. She subsequently went bankrupt and sold her home in foreclosure. These were all matters from which one object of the ongoing conspiracy, i.e., payment, could be inferred at the time Kyung made the statements. In this case, the conspirators did not "forsake each other once the original substantive object of the conspiracy is achieved or abandoned." (*Leach, supra*, 15 Cal.3d at p. 436.) Defendant repeatedly demanded payment from Kyung and her "efforts at a payoff [were] necessary to preserve the debtor's personal safety" (*Ibid.*)

Next, defendant claims Kyung's statements were not admissible under the spontaneous statement exception to the hearsay rule. He asserts her report to Herman of what defendant said to her on the telephone did not describe an act or event she perceived and the prosecution failed to show that the statement was made shortly after receiving the phone call. She told Herman she had "just" talked to defendant, but "the only clue to when [Kyung] had talked to [defendant] was in the word 'just.' When used to denote the timing of an event, 'just' is defined as a 'short time ago' or 'very recently.' [Citation.] Very recently or a very short time ago is too vague a temporal signifier to satisfy the stringent time requirements of [Evidence Code] section 1240." (Emphasis original.)

A statement comes within the spontaneous exception to the hearsay rule if it "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] . . . [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) "Spontaneous" is used "to describe actions undertaken without deliberation or reflection." (*People v. Farmer* (1989) 47 Cal.3d 888, 903 (*Farmer*).)

Statements that qualify as spontaneous statements are deemed sufficiently reliable for admission because the declarant, acting under the stress of the events at issue, will not have had time to reflect on the event and the statements will be “the instinctive and uninhibited expression of the speaker’s actual impressions and belief.” (*Farmer, supra*, 47 Cal.3d at p. 903.) The “crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . the mental state of the speaker.” (*Ibid.*) Even statements made two days after the event have been permitted-so long as the declarant remained sufficiently agitated. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1235 [statement given after child witnessed mother’s murder was admissible].)

In the instant case, Kyung emerged from her office crying and hysterical and told Herman she had “just” talked to defendant who wanted to meet her but she had refused because Maria was not there. Defendant said he wanted more money or else he was going to kill her daughter who was in college in San Diego. This evidence supports the conclusion that Kyung’s emotional state was the immediate result of defendant’s threats to kill Helen unless he was paid. Even if there was a lapse of time, that factor alone did not deprive the statement of spontaneity. (*People v. Raley* (1992) 2 Cal.4th 870, 893-894.) Herman described a sufficiently excited state for the trial court to conclude Kyung still labored under the emotional influence of the disturbing threats she had received. There was no abuse of discretion in finding the statement to be a spontaneous declaration. Since the statement falls within a firmly-rooted hearsay exception, defendant’s right to confrontation of witnesses was not violated. (*Lilly v. Virginia* (1999) 527 U.S. 116, 124-125.)

DEFENDANT’S ADMISSION AND THREATS

Next, defendant claims the trial court’s admission of Sanchez’s testimony that Bravo had told him that defendant admitted killing Young at a barbecue resulted from the court’s failure to balance the prejudicial effect of the statement against its probative value

under Evidence Code section 352 (section 352). In addition, Bravo's testimony that "Chuy" told him that defendant threatened to kill him if he said anything was irrelevant and prejudicial.

After considerable argument about the credibility of Bravo and Sanchez, with defendant claiming that the admission was actually a rumor started by one Arturo Macias and conveyed to Bravo and that Sanchez was not credible when he said Bravo told him, the trial court stated that "doesn't mean it's legally inadmissible. It means you have the burden to attack his credibility, because it does come in as a prior inconsistent statement to the in-court testimony of Mr. Bravo." Defendant then stated he was asking the court to exclude it under section 352. The court responded, "well, under [section] 352 I have to exercise discretion and balance prejudice versus probative value. I have to factor in confusion to the jury, time frame considerations, remoteness, et cetera, et cetera. And I don't understand how any of those factors apply under 352 to a simple declaration . . . prior inconsistent statement." The trial court reasoned that defendant's statement was a declaration against penal interest admissible for the truth of the statement and Bravo's testimony that he did not say that to Sanchez was a prior inconsistent statement. The court concluded, "it's not 352."

Defendant claims that in not mentioning prejudice, the record did not affirmatively show that the trial court weighed the probative value of the evidence against its prejudicial effect. He further complains that because the judge stated "[i]t's not a [section] 352 issue," the court declined to balance probative value against prejudice.

The balancing test is satisfied if the record as a whole shows that the court was aware of, and performed, its balancing function. (*People v. Riel* (2000) 22 Cal.4th 1153, 1193-1194.) "[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so. All that is required is that the record demonstrate the trial court understood and fulfilled its responsibilities under . . . section 352." (*People v. Williams* (1997) 16 Cal.4th 153, 213.)

“ ‘Prejudice’ as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent’s position or shores up that of the proponent. The ability to do so is what makes evidence relevant. . . . [¶] . . . [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.” (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

In the instant case, the record shows that the trial court fully understood its obligations under section 352. It found that the probative value of Sanchez’s testimony of defendant’s admission was “powerful evidence.” The court asked defense counsel what the counterbalancing factors were under section 352. The only one counsel mentioned was the fact that Sanchez did not report the conversation when he was interviewed by the police two weeks after the disappearance was reported but only mentioned it four years later when he was interviewed by a district attorney investigator. The trial court found that concerns about Sanchez’s veracity were grounds for cross-examination, not exclusion. The trial court did not err in admitting the evidence.

Next, defendant claims that it was error to allow Bravo to testify that defendant threatened Chuy because it was irrelevant and prejudicial. Right after Bravo denied telling Sanchez that Bravo had heard defendant brag about killing “the Chino,” the prosecutor asked Bravo if he was afraid of defendant. Bravo replied, “I don’t-What I said, I don’t want problems because of same [*sic*] family. We are from the same town.” Bravo stated that he and defendant were like “part of the family.” The prosecutor then asked, “So there would be problems?” Bravo responded, “Not a problem. It’s just, it’s just the feelings.” The prosecutor asked Bravo, “Did you recall being told by a

gentleman named Chuy that [defendant] had threatened him: ‘If you say anything, Chuy, I’ll kill you?’ ” Defendant objected on hearsay and relevance grounds that the testimony was “rather marginal.” The trial court found that the evidence was not “marginal at all . . . [but was] very relevant. I think it’s probably one of the key factors the trier of fact is going to consider in determining whether or not he is lying here in court or whether or not he is lying when he talked to Mr. Sanchez.” The court instructed the jury that the evidence was not offered for the truth of what Chuy stated but for the fact that Bravo said it. Defendant now states that because Bravo denied being afraid because of defendant’s threat to Chuy and because there was no showing that Bravo had changed his testimony the evidence was inadmissible.

The trier of fact “may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . [¶] (f) The existence or nonexistence of a bias, interest, or other motive. . . . [¶] . . . [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.” (Evid. Code, § 780.) Evidence that a witness is afraid to testify may be admissible as relevant to the witness’s credibility. (*People v. Malone* (1988) 47 Cal.3d 1, 30.) Where a witness is afraid or fearful, evidence of threats made against the witness may be admissible even though there is no evidence marking the defendant as responsible for the threats. (*People v. Avalos* (1984) 37 Cal.3d 216, 232.)

Defendant claims that there must be some foundational evidence that the witness changed his story for the evidence to be admissible. Evidence Code section 780 does not require such a foundation. The cases defendant cites for that proposition do not support him. *People v. Brooks* (1979) 88 Cal.App.3d 180, 186-187, held that evidence of threats was admissible to show the falsity of the witness’s recantation of her pretrial identification. *People v. Yeats* (1984) 150 Cal.App.3d 983, 986-987, allowed in evidence that an unknown person had attempted to pressure an eyewitness to testify falsely in the

defendant's favor. The court explained that the witness's credibility was a material issue because his testimony conflicted significantly with the injured victim's testimony. "[I]t was therefore proper to admit evidence tending to show he was fearful, thereby providing a motive not to tell the truth." (*Id.* at p. 987.) The court did not state that there must be a showing that the witness had changed his story in order for him to be impeached. *People v. Burgener* (2003) 29 Cal.4th 833, 869, involved a retrial where the witness's testimony on identification was inconsistent with her testimony at the first trial. The court did not hold that there had to be an inconsistency, or that it could only be testimonial, in order for the witness to be impeached by evidence of threats made to the witness.

In the instant case, Bravo made inconsistent statements. At trial, he denied being at the Covian barbecue where he heard defendant brag about killing Young and he denied telling this to Sanchez. Later he admitted telling the investigator he was afraid of defendant although he denied that he was afraid because Chuy told him of the threat to him. This evidence was highly relevant as it assisted the jury in determining the veracity of Bravo's and Sanchez's testimony. Allowing the jury to consider Bravo's knowledge of a death threat to another potential witness if he testified was not arbitrary, capricious, or irrational. There was no abuse of discretion under section 352.

REOPENING THE CASE

Next, defendant states the court abused its discretion in refusing to reopen the case when Arturo Macias became available to testify. Although Sanchez testified Bravo had told him about defendant's admission, Bravo had told a prosecution investigator that he heard about it from Macias. Macias was in Mexico and was not subpoenaed by the defense to testify, but while the jury was deliberating, he became available. He told a defense investigator that he had a conversation with Bravo at a gas station. Defendant moved to reopen the case after the jury sent out a question reading, "[i]f witness A. says, 'I never said X. to B.,' and witness B. says, 'A. told me X.,' it seems that we may use rule CALJIC 213 to determine that X. is true. Have we understood this rule correctly? How

does this rule work with [CALJIC No.] 209.” The trial court concluded the issue was “just a question of credibility. The jury is going to believe Mr. Bravo or they are going to believe Mr. Sanchez. . . . [¶] . . . [F]rom a very technical legal perspective, it is admissible for impeachment. And, yes, it is admissible for the truth of the matter asserted, if the trier of fact wants to reach that conclusion based upon their evaluation of those two witnesses and their evaluation of their credibility. But I’m not going to stop the jury deliberations now to reopen the trial and have additional evidence offered and additional cross-examination. And maybe that would cause additional witnesses to be called and have a mini trial now. It’s not appropriate. It’s not timely. And so that request is denied.”

A trial court has discretion to order a case reopened even after jury deliberations have begun. (*People v. Newton* (1970) 8 Cal.App.3d 359, 383.) The decision whether to do so is within the trial court’s discretion and will not be disturbed unless there is a clear showing of an abuse of discretion. (*People v. Frohner* (1976) 65 Cal.App.3d 94, 110.) The factors to consider in reviewing the trial court’s exercise of discretion include the stage the proceedings have reached when the motion is made; the diligence shown by the moving party in discovering the new evidence; the prospect that the jury would accord the evidence undue emphasis; and the significance of the evidence. (*Ibid.*)

“A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by . . . an offer of proof, or by other means.” (Evid. Code, § 354.) “An offer of proof must consist of material that is admissible, and it must be specific in indicating the name of the witness and the purpose and content of the testimony to be elicited.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1176.)

In the instant case, although defendant claims he made the request as soon as the witness was available, it came at an extremely late stage of the proceedings when the jury had already been deliberating for a day and a half. Defense counsel moved to reopen the case by stating he was persuaded that Macias had started a “rumor” during a conversation with Bravo at a gas station. However, counsel did not say what Macias would actually testify to, or identify the source of any of Macias’s information. There was no showing exactly what information Macias had or how he got it. In an earlier argument on the issue whether Sanchez’s testimony impeaching Bravo should be admitted, defense counsel mentioned Macias and stated he was another person connected to the family. However, in his offer of proof, counsel did not clarify whether Macias was at the barbecue or if defendant spoke of the killing to him or if Macias heard of defendant’s involvement from one of the many persons both in and outside the Covian family who knew of it. Consequently, defendant’s offer of proof was too sketchy to satisfy Evidence Code section 354.

Second, Macias’s testimony was not that significant. If he testified that he passed on to Bravo what somebody told him, his testimony was hearsay and inadmissible. If he said he heard defendant admitting that he killed Young, his testimony was admissible as evidence of an admission by defendant, but it was cumulative to the testimony of Sanchez. The court did not err in refusing to reopen the case.

PROSECUTORIAL MISCONDUCT

Lastly, defendant claims the prosecutor’s improper closing argument violated his constitutional rights to due process and a fair trial. The prosecutor recalled for the jury certain “promise[s]” he said defense counsel had made in his opening statement (for example, that “ ‘Vizcaino was this big perjurer’ ”) and then claimed counsel could not

deliver on his promises.⁸ The prosecutor argued that in considering who was telling the truth, the jury should consider whether a person “change[d] their story as the facts

⁸ In his opening statement, defense counsel asserted: (1) Danny Callahan and Adrian Vizcaino were liars and perjurers and that Callahan expected good treatment for his felonies in Washington state. (2) As to the money Kyung borrowed, evidence would show she gave it to a relative in Korea. (3) The defense would show that defendant’s brother Octavio Covian obtained \$9,000 cash from his credit cards and loaned defendant another \$5,000 to make a down payment on the house he bought. (4) Defense counsel stated there was “not a shred of evidence” that the money was passed from Kyung to defendant. (5) Defense counsel stated the evidence would show that Javier Camacho, defendant’s sister Marina’s husband, originated the rumors about the supposed location of Young’s body. (6) Counsel stated that Vizcaino’s story was that defendant committed a homicide at Young’s house with two people “named Fred and Oscar Medina.”

In closing argument, the prosecutor stated that the defense could not get Callahan or Vizcaino to “change their stories one bit. But that’s what he had promised you. Oops.” In fact, defense counsel’s “promise” was fulfilled by Sandra Herman’s testimony that her brother-in-law Danny Callahan was a habitual liar and criminal and that she would not believe a word he said. As for the money Kyung borrowed that the prosecution asserted she gave to defendant, he stated, “[h]ow about the fact that Sandy Herman described [Kyung] reporting this man extorting the money from her, threatening to kill her and her kids if he didn’t get more money? Do you think that’s a connection? A little bit of an oops from that opening statement.” After summarizing evidence regarding defendant’s finances and Kyung’s borrowing of money, he asked, “How about a reasonable explanation for that? Nothing. Because he can’t. He can promise you something, but the truth is, this man is a guilty murderer. Oops.” In fact, Kyung’s older sister testified that Kyung lent \$10,000 to her family in Korea and sent up to \$1000 a month for their expenses. As to Octavio’s loaning defendant money for a down payment on the house, he said, “You heard in your opening statements about . . . how Octavio was going to come in and testify about the Visa, that statement, the Mastercard he borrowed. Did you hear about that? No. Another false promises [*sic*]. Oops. [¶] I guess the story changed again. . . . It’s just another false thing he could not prove.” However, Octavio’s wife Margarita testified that she and Octavio borrowed money from their credit cards and took money from savings to lend to defendant when he was buying the house. About Javier Camacho, the prosecutor said, “[defense counsel] promised you that he would show you this was all just a big misunderstanding. . . . [¶] Remember him telling you about those rumors, he’s going to show how Javier Camacho is the man? . . . Did you ever hear from Javier Camacho?” Actually, a police officer testified that Camacho was the anonymous informant and Humberto Covian testified that Camacho had spread false rumors about defendant. The prosecutor stated defense counsel promised that “you are going to hear some story about Fred and Oscar Medina who were accused of this murder. (continued)

change[d], as they are confronted with inconsistencies.” He also stated he was not “blaming” defense counsel: “The problem is, that it’s very difficult to defend a guilty man when there is this much evidence” and “because of the nature of who his client is [a scary man].” Defendant concluded, “[t]he prosecutor’s argument amounted to a claim that [defendant] was guilty-so guilty that defense counsel’s difficulty in representing such a guilty client led him to make unfulfilled evidentiary promises. The result was an unfair trial and a violation of [defendant’s] federal due process rights.”

Defendant also claims that the prosecutor was factually incorrect in some respects and that he “committed prejudicial misconduct by exploiting the disparity between defense counsel’s opening statement and the evidence presented because defense counsel’s opening statement is **not** evidence.” (Emphasis original.) He also states the argument violated his federal due process rights to a fair trial because it “improperly elevates counsel’s opening remarks to the status of properly-introduced evidence of prior inconsistent statements, and then conveys to the jury the dual impressions that the defendant is lying and guilty; and that defense counsel doesn’t know what he is doing.”

Prosecutorial misconduct involves either the use of deceptive or reprehensible methods to attempt to persuade the trial court or jury (*People v. Silva* (2001) 25 Cal.4th 345, 373), or conduct so egregious that “it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Generally, a defendant may not complain on appeal that the prosecutor has committed misconduct during argument unless the defendant made a timely and specific objection and request for admonition or curative instruction or both. A defendant will be excused from the necessity of objection and/or request for admonition if either would be

Did you ever hear from Fred or Oscar Medina? Did you ever hear anything more about that except in the opening? Changed the story again. Oops.” The Medinas did come up when Humberto Covian was asked about them but denied being present when Vizcaino was told that the Medinas were involved in killing Young.

futile or would not have cured the harm caused by the misconduct. Finally, the issue is not forfeited if the court immediately overrules an objection to alleged misconduct leaving the defendant with no opportunity to request an admonition. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

The People claim defendant waived the issue because “defense counsel’s lone objection came *after* all the other prosecutor’s arguments about what the defense had promised but not delivered.” (Italics original.) When defense counsel finally objected toward the end of that part of the prosecutor’s argument, however, the court stated, “this is argument. It’s not evidence you [the jury] can consider in the trial. And with that comment, you [the prosecutor] may proceed.” Defendant therefore argues that further objections were futile.

We do not agree that timely objections would have necessarily been futile, but we are satisfied there was no misconduct. It is true that “ ‘the only purpose of an opening statement by counsel is to apprise the jury in a general way of what is expected to be proved; but that it has no binding force as against the party in whose behalf it is made; nor can it be considered as evidence of any fact.’ ” (*People v. Pantages* (1931) 212 Cal. 237, 244.) It is also true that “ ‘in the trial of an action, proper argument should be based solely on the evidence and that if the opening statement to the jury does not constitute evidence and is not binding upon the party making it, then, in the absence of “bad faith,” his failure to “make good” should not be argued by the opposite party as a reason for a verdict.’ ” (*Ibid.*) Nevertheless, a prosecutor is within his “ ‘legal rights in plainly and simply directing the attention of the jury to the fact that, although counsel for defendant had stated to the jury that he expected to prove certain specified facts on behalf of defendant, nevertheless no evidence had been received by the court in substantiation thereof, . . . ’ ” (*Id.* at p. 245.)

In the instant case, the prosecutor did not accuse defense counsel of bad faith in making the opening statement nor did he impugn the integrity of defense counsel. In

fact, he made a point of assuring the jury before he began that defense counsel was “an excellent lawyer. You don’t try cases at this level. And you saw the work he did. He’s very smooth, very effective. And nothing I’m saying right now is meant as any attack on him. What I am going to point out is the problems of his case. The very difficult thing it is to do to represent an obviously guilty man.” What the prosecutor argued was the “common” practice of reminding the jury that the promised evidence in opposing counsel’s opening statement never materialized. (*People v. Harris* (1989) 47 Cal.3d 1047, 1085, fn. 19.) Besides the statements of which defendant complains, the prosecutor finished his argument by going over the evidence which was particularly pertinent on the issue of defendant’s guilt and the conspiracy with Kyung. The prosecutor clearly emphasized the jury’s function as the finder of fact on the evidence properly placed before it. Defendant was not deprived of a fair trial.

In his petition for a writ of habeas corpus, defendant repeats his claims his counsel provided ineffective assistance of counsel and deprived him of his right to a fair trial by failing to object on federal constitutional grounds to the admission of evidence and the trial court’s refusal to reopen the case. We have rejected these contentions and have found no error or prejudice.

DISPOSITION

The fine imposed pursuant to Penal Code section 1202.45 is vacated. In all other respects, the judgment is affirmed. The petition for a writ of habeas corpus is denied.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.